

disclosure becomes necessary, please contact this office for our views.

If you have any questions, telephone Murali Balachandran of our office at (212) 264-1595, ext. 330.

ROLAND BARRAL
Area Counsel (LMSB:FSH)

By: _____
PETER J. LABELLE
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Office of Chief Counsel
Internal Revenue Service
memorandum

CC:LM:FSH:MAN:TL-N-1620-01
MBalachandran

date: April 24, 2001

to: Eileen Jannazzo, Territory Manager, Territory 1500, Manhattan
Attn: International Examiner Michael Signorile, Group 1502

from: Area Counsel (LMSB:FSH)

subject: [REDACTED]
Consent to Extend the Statute of Limitations on Assessment for Tax
Years Ending [REDACTED]

STATUTE OF LIMITATIONS EXPIRES [REDACTED]

UIL No. 6501.08-09; 6501.08-10; 6501.08-12

EIN No. [REDACTED]

Background

This memorandum responds to your request for assistance on March 1, 2001. This memorandum should not be cited as precedent.

[REDACTED] (" [REDACTED]
[REDACTED] ") was a foreign sales corporation ("FSC") incorporated in Barbados. [REDACTED] dissolved on [REDACTED] and all its assets were transferred to its parent corporation. You have asked us to advise you who should now consent to an extension of the statutory period of limitations to assess taxes against [REDACTED] for the tax year ending [REDACTED].

Issues

1. Is there a winding-up period upon the dissolution of a Barbados corporation during which the corporation's officers may act on its behalf to consent to extend the period to assess?
2. Should the transferee corporation of [REDACTED] execute consents to extend the period to assess?

Conclusions

- 1) There is a two year winding up period under the Companies Act of Barbados during which an officer of a dissolved corporation may consent to an extension of time to assess. The two year period in this case ends on [REDACTED]. However, because the three year statute of limitations under I.R.C. § 6501(a) expires on [REDACTED], the consent to extend the period of limitations to assess must be executed prior to [REDACTED].
- 2) The transferee corporation should also consent to an extension of time to assess.

Facts

[REDACTED]

[REDACTED] was incorporated in the Barbados as a foreign sales corporation on [REDACTED]. It was a wholly owned subsidiary of [REDACTED] which was in turn a wholly owned subsidiary of [REDACTED]. [REDACTED] was liquidated on [REDACTED].

On [REDACTED], [REDACTED] merged with [REDACTED] Companies, Inc. and the surviving corporation was named [REDACTED]. On [REDACTED], [REDACTED] changed its name to [REDACTED] (" [REDACTED] "). All the corporations involved, other than [REDACTED], are incorporated in Delaware.

[REDACTED] filed a return for the year ended on [REDACTED] on [REDACTED]. The assessment limitations period expires on [REDACTED].

Dissolution of [REDACTED]

The Barbados Registrar of Companies issued a Certificate of Dissolution on [REDACTED] attaching the Articles of Dissolution from the corporation. Those Articles state that the corporation "has no property and no liabilities."

There is some discrepancy about who received the assets of [REDACTED] upon its dissolution. The "Statement with Regard to Liquidation of Foreign Subsidiary as required under Regulation § 1.367(b)-1(c)(1)" filed as an attachment to [REDACTED] final Form 1120-FSC states that the assets of [REDACTED] were transferred to [REDACTED].

However, the "Statement with Regard to Liquidation of Foreign Subsidiary as required under Regulation § 1.367(b)-1(c)(1)" filed with the [REDACTED] return for the consolidated group [REDACTED] states that the assets of [REDACTED] were distributed to [REDACTED], which is a subsidiary of [REDACTED].¹

On [REDACTED], [REDACTED] replaced two directors. The new directors were [REDACTED] and [REDACTED]. The third continuing director was [REDACTED]. [REDACTED] signed the tax returns for the period ending [REDACTED]; [REDACTED] and [REDACTED]. His title on the returns is Assistant Vice President. The other named officers of [REDACTED] at the time of its dissolution were [REDACTED], President; [REDACTED], Treasurer; [REDACTED], Assistant Secretary; and [REDACTED], Secretary. You have advised us that although [REDACTED] no longer works for [REDACTED], two other former officers of [REDACTED] and [REDACTED] presently work for [REDACTED]. [REDACTED] is an executive vice president and [REDACTED] is the vice president/treasurer of [REDACTED].

Existing Power of Attorney

Subsequent to the dissolution of [REDACTED] on [REDACTED], a person named [REDACTED] signed a Form 2848, "Power of Attorney and Declaration of Representative," on behalf of [REDACTED]. Although [REDACTED] is not listed as an officer of [REDACTED] on the Corporate Data Sheet as of [REDACTED], provided by the taxpayer, he is identified on the Form 2848 as a "[REDACTED]." The power of attorney is in favor of [REDACTED] and [REDACTED], both of [REDACTED].

Taxpayer's Position

Recently, when you asked for an extension of time to assess to be signed for [REDACTED], the taxpayer claimed that [REDACTED] would not execute such a document and that the power of attorney previously signed is invalid. The taxpayer refused to sign by claiming that because [REDACTED] was dissolved under Barbados law it could not have any further tax

¹ [REDACTED] is included on Form 851, the "Affiliations Schedule" attached to the consolidated income tax return for [REDACTED] and subsidiaries for the year ending [REDACTED].

liability.

Discussion

As a preliminary matter, we recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 121.2.22.3 requires use of Letter 907(DO) to solicit the extension, and IRM 121.2.22.4.2 requires use of Letter 929(DO) to return the signed extension to the taxpayer. The AIMS/Processing Handbook (IRM 104.3) provides the procedures for processing consents to extend the statute of limitations on Assessment. In this regard, IRM 104.3.30.11.3 discusses the preparation of Form 895 and Form 5348 when a consent to extend the statute of limitations is received by the Service. Dated copies of both letters should be retained in the case file as directed. When the signed extension is received from the taxpayer, the responsible manager should promptly sign and date it. The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or its equivalent. This includes Form 5348. In the event an extension becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Extension of Statute of Limitations

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). However, the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations on assessment. I.R.C. § 6501(c)(4). For corporations, the form used by the Service to extend the limitations period on assessment is Form 872 (Consent to Extend the Time to Assess Tax).

You must advise the taxpayer of its right to refuse to extend the statute of limitations or, alternatively, to limit an extension to particular issues or specific periods of time. I.R.C. § 6501(c)(4)(B). We suggest using Publication 1035 when soliciting the Form 872 to satisfy this requirement, or advising the taxpayer by some other writing or orally. In any event, your actions should be documented in the file.

Power of Attorney

The existing power of attorney may or may not be valid. In order to be valid the power of attorney must be signed by an officer of [REDACTED]. See IRM Sub-

Section 39.1.10.3(d). Accordingly, if [REDACTED] is not an officer of [REDACTED], the taxpayer's position that the power of attorney is invalid, may be correct.

You should first clarify, therefore, whether [REDACTED] was an officer of [REDACTED] at the time of its dissolution to determine whether the existing power of attorney is valid. If it is valid, you may deal with the representatives named in the Form 2848 in seeking an extension of time to assess. If the Form 2848 is not valid, then you should follow the procedure in IRM Sub-Section 39.1.10.3(f) which allows you to contact the taxpayer to ask for an acceptable Form 2848 and/or send a Letter 2587 (Exhibit 39.1.10-5) or other appropriate letter to the representative advising that the authorization is not acceptable.

If the taxpayer does not provide an acceptable power of attorney, as discussed below you should deal only with an officer of [REDACTED] at the time of its dissolution.

Foreign Sales Corporation ("FSC")

A FSC is a corporation organized pursuant to the laws of a qualified foreign country or U.S. possession. I.R.C. § 922(a)(1)(A). [REDACTED] was organized under the laws of Barbados. It was a FSC.

In general, the corporate existence of a FSC is respected for U.S. tax purposes, including periods of limitations. See generally Union Carbide Corp. v. Commissioner, 110 T.C. 375 (1988). Because a FSC is organized under the laws of a foreign country or a U.S. possession, it is not part of its U.S. parent's consolidated group. I.R.C. §§ 922(a)(1)(A); 1504(a)(1) and (b)(3). It is not appropriate, therefore, for the U.S. parent of the FSC to consent to extend the statute of limitations with respect to the FSC. Instead the FSC itself is the proper party to consent to extend the statute of limitations. Thus, [REDACTED] should consent to the extension of the statute of limitations.

[REDACTED] articles of dissolution indicate that the company was dissolved pursuant to the Companies Act of Barbados, Sections 363 to 370. However, the Companies Act of Barbados, Section 384(2), provides that "notwithstanding the dissolution of a company under this Act . . . a civil, criminal, or administrative action or proceeding may be brought against the company within two years after its dissolution as if the company had not been dissolved." In this case that two year period would expire on [REDACTED].

The authority of an officer to consent to extend the period of limitations for assessment must be determined under Barbados law. United States v. Krueger, 121 F.2d 842, 845 (3rd Cir.), cert. denied, 314 U.S. 677 (1941). We recommend that you obtain a Form 872, Consent to Extend the Time to Assess Tax, executed by a corporate officer of the dissolved FSC. See Companies Act of Barbados § 93 and the above discussion regarding the power of attorney.

Because there is a two-year winding-up period under the Companies Act of Barbados, the Form 872 must be executed prior to the expiration of the winding-up period on [REDACTED]. See, H.D. Walbridge & Co. v. Commissioner, 25 B.T.A. 1109 (1932), compare, Union Shipbuilding Company v. Commissioner, 43 B.T.A. 1143, 1145 (1941), acq., 1941-1 C.B. 11 (extension executed after expiration of winding-up period specified by Delaware law invalid). However, under I.R.C. Section 6501, the Form 872 must be executed prior to the expiration of the statute of limitations for the tax years in question. Since the three year statute of limitations for the earliest return filed on [REDACTED] expires on [REDACTED], the extension must be executed by the taxpayer and the Commissioner prior to [REDACTED].

We are not aware of cases interpreting Barbados law as to whether the taxpayer and the IRS may agree to extend the statute of limitations beyond the winding-up period. However, in a case involving Delaware law, the Board of Tax Appeals has held that the officer of a dissolved corporation has authority to extend the period of limitation to a date beyond the end of the winding-up period, provided that the extension was executed within the period. H.D. Walbridge & Co. v. Commissioner, 25 B.T.A. 1109 (1932).

Transferee Liability

Because [REDACTED] has dissolved and no longer exists, we also recommend that a consent to extend the statute of limitations for transferee liability and a transferee agreement be obtained from [REDACTED].

I.R.C. Section 6901(a) provides a procedure through which the Service may collect from a transferee of assets unpaid taxes owed by the transferor of the assets if a basis exists under applicable state law or equity for holding the transferee liable. Hagaman v. Commissioner, 100 T.C. 180, 183 (1993). The Service bears the burden of proving that a taxpayer's acts render the taxpayer liable as a transferee. See I.R.C. § 6902; T.C. Rule 42.

A transferee's liability may be established either at law or in equity. Estate of Stein v. Commissioner, 37 T.C. 945 (1962), subsequent proceedings, 40 T.C. 275 (1963). In general, stockholders who receive liquidating distributions from a corporation that subsequently winds up its affairs and dissolves without paying its federal income tax liability have been held to be transferees under the trust fund doctrine. Dillman v. Commissioner, 64 T.C. 797 (1975); Foster v. Commissioner, T.C. Memo. 1967-224; Neill v. Phinney, 245 F.2d 645 (5th Cir. 1957); Commercial Finance Co. v. Commissioner, T.C. Memo. 1968-229.

Under Delaware law, the merger of [REDACTED] with [REDACTED] into [REDACTED] and the subsequent renaming of [REDACTED] to [REDACTED] results in [REDACTED] being liable for [REDACTED]'s transferee liability. See Del. Gen. Corp. Law § 259 (in the case of a merger, "... all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.")

Thus, we recommend that you obtain Form 2045, Transferee Agreement, and Form 977, Consent to Extend Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax against a Transferee or Fiduciary, from [REDACTED]. You should not rely on Form 2045 to satisfy the Service's burden of proof with respect to transferee liability. Case law suggests that the execution of Form 2045 merely provides evidence of transferee liability. See Southern Pacific Transportation Corp. v. Commissioner, 84 T.C. 367, 374 n.6 (1985).

Prior to obtaining the Form 2045 and Form 977, you must clarify whether [REDACTED] assets on dissolution were transferred to [REDACTED] or to [REDACTED]. In either case, subject to the wording below, because the common parent acts as sole agent for each member of a consolidated group with respect its tax liabilities, an authorized officer of [REDACTED] would have to execute the Forms 977 and 2045. See I.R.C. § 1501 and the regulations thereunder. Authorized officers include the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act on behalf of ContiGroup. See Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

If the assets were transferred to [REDACTED], the caption on the Form 977 should read: "[REDACTED] formerly known as [REDACTED] as successor by

way of merger to [REDACTED], as transferee of [REDACTED]. This with respect to the tax liability of [REDACTED] for the tax year ended [REDACTED]."

If the assets were transferred to [REDACTED], the caption on the Form 977 should read: "[REDACTED] formerly known as [REDACTED] as successor by way of merger to [REDACTED], parent of [REDACTED], as transferee of [REDACTED]. This with respect to the tax liability of [REDACTED] for the tax year ended [REDACTED]."

Given that [REDACTED] dissolved on [REDACTED] pursuant to I.R.C. § 6901(c) the periods of limitation for assessment with respect to the transferee is open until at least [REDACTED], which is one year after the end of the three year period of limitation on assessment generally applicable to [REDACTED].

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

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